

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

DECISION AND ORDER

04-CR-6032L

v.

RICKY DE SANTIS,

Defendant.

The defendant, Ricky DeSantis (“DeSantis”), pled guilty to Counts I and II of the Indictment and was sentenced principally to a term of five (5) years imprisonment and four (4) years supervised release. (Dkt. #44, #53).

DeSantis, proceeding *pro se*, has now filed a motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. §2255, on the grounds that his counsel was ineffective. (Dkt. #54). DeSantis claims that despite a provision in his plea agreement waiving his right to appeal the sentence imposed, he was led to believe that his assigned counsel, public defender Robert Smith (“Smith”) would appeal the sentence, and that counsel did not do so. DeSantis contends that, as a result, the time to appeal has expired and he has lost the opportunity to appeal his sentence.

The Court is familiar with the defendant's plea and the circumstances surrounding it, but I find that the record requires some amplification. I therefore direct the Government to contact Smith, and to provide the Court with an affidavit from Smith describing the relevant circumstances, discussions and advice relating to the appeal waiver provision in DeSantis's plea agreement, any subsequent attempt, or lack thereof, to appeal DeSantis's sentence, and any other matters required to pointedly respond to the allegations in the petition.

I find that because DeSantis has filed a petition challenging his attorney's effectiveness and conduct, his attorney is no longer bound to maintain the confidentiality of any attorney-client communications with DeSantis, to the extent that their disclosure is necessary to defend against DeSantis's allegations and inform the Court of the relevant facts. *See generally* ABA Model Rules of Professional Conduct, Rule 1.6(b)(5), (6).

I direct the Government to obtain the affidavit described herein within twenty (20) days of entry of this decision and order, and to provide the Court, and DeSantis, with copies of the same.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "David G. Larimer", is written over a horizontal line.

DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
May 14, 2009.